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Harmonising European Private International Law: A Replay of Hannibal's Crossing of the Alps?

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In 218 BC, the Carthaginian general Hannibal (247-182) achieved a most extraordinary feat: he crossed both the Pyrenees Mountains and the Alps with an army of about 38.000 soldiers, 8.000 Cavalry and 37 elephants, aiming to win the Second Punic War by a bold invasion of Italy before the Romans were prepared. Even if his attempts to defeat the Roman legions failed in the end, common lore¹ stills tells the story of the elephants crossing the Col du Mont Genève in deep snow, setting thus an example of a near impossible achievement for generations to come.

Such a near impossible achievement is being accomplished today in the field of European Private International Law. The Tampere European Council on 15 and 16th October 1999, laid down that there could not be a genuine internal market in the European Union without a common law-enforcement area in which all citizens could assert their rights not only in their home country but also in other Member States.² Since then, the European Commission has launched an important programme aiming at the Harmonisation of the rules of European Private International Law.³

Private Law in general tends to organise social relationships between private citizens or non-State organisations. Private international law is made up of mechanisms that facilitate the settlement of international disputes between the same. It answers three questions:

1. Which country's courts have jurisdiction in a dispute (i.e. conflicts of jurisdiction)?

2. Which country's substantive law is to be applied by the court hearing the case (i.e. conflict of laws)?

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¹ But also Polybius 3.50-55 and Livy 21.32.6-37.6.

² http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm

³ Katharina Boele-Woelki, Unification and Harmonization of Private International Law in Europe, in *Private International Law in the International Arena, From National Conflict Rules Towards Harmonization and Unification*, Liber amicorum Kurt Siehr, TMC Asser Press 2000, p. 61.

3. Can the decision given by the court which declared that it had jurisdiction be recognised and, if necessary, enforced in another Member State (i.e. mutual recognition and enforcement of foreign judgments)?⁴

All these rules aim at a better coordination between legal systems and do not generally seek a particular result in a legal dispute.⁵ Private international law thus plays the part of a legal marshalling yard.

Practically speaking, in an international dispute, for example, between a French tourist and an Italian hotel manager in Florence, the first question the Italian plaintiff must answer is which country's courts have international jurisdiction. It is likely that in this case the courts of Florence would have jurisdiction.⁶ Once this has been determined, this court will decide which law is applicable to the dispute. Here again it is likely that Italian law will apply.⁷ It is only when this court has passed judgment that the problem of enforcement abroad will arise. In other words, enforcement rules show how the Italian hotel manager can enforce the judgement in France where the French tourist has assets.

Up to recently, each Member State had its own national rules of private international law that its courts applied without taking into consideration the fact that their decision could contradict a court decision already rendered by a foreign court. It was therefore possible in an international dispute, depending on which country's court was chosen, that the solution to a case differed considerably. Technically such divergences were the result of classical bilateral conflicts of law rules.⁸ To avoid such situations, the European governments decided to harmonise their private international law rules. Doing so, European law has adopted a new approach to private international law,⁹ introducing a number of unilateral conflicts of

⁴ The following explanations have been taken from the *Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation*, COM (2002) 654 final, p. 8.

⁵ Bernard DUTOIT, *Le droit international privé ou le respect de l'altérité*, Coll. Quid Juris ?, Schulthess 2006, p. 6.

⁶ Art. 5.1 Bruxelles I Regulation. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

⁷ Articles 3 and 4 of the Rome Conflicts of Law Convention.

⁸ Bernard DUTOIT, *op. cit.*, Coll. Quid Juris ?, Schulthess 2006, p. 7. : a bilateral conflicts rule can lead to applying either the *lex fori* or a foreign law.

⁹ Gian Paolo Romano, *Le retrait de la règle bilatérale classique face à l'intervention d'une autorité*, to be published in RCDIP 2006.

law rules. Such rules aim more at ensuring the application of a unified body of European law than at coordinating different legal systems. Nevertheless, the *corpus* of European private international law rules is not uniform, due to historical circumstances.

The first attempts at harmonizing European Private International Law lead to the 1968 Brussels Convention¹⁰ on jurisdiction and the recognition and the enforcement of judgments in civil and commercial matters.¹¹ This was followed in 1980 by the Rome Convention on the Law Applicable to Contractual Relations.¹² There is however a great difference between the scopes of both conventions. Whereas the Brussels Convention covers both contractual and non contractual obligations, the Rome Convention only covers contractual obligations. For the past twenty-five years the European Commission has been trying to bridge this lack of uniformity and has recently been working on a Rome II instrument on the law applicable to non-contractual relations.¹³

The situation since 1968 has recently changed drastically, as the European Union now has greater law-making competences. The Amsterdam Treaty provided in 1997 for the transfer of judicial cooperation in civil matters from the third pillar to the first pillar and established a European law-enforcement area.¹⁴ The objective was to enable individuals and businesses to approach courts and authorities in any Member State as easily as in their own.

¹⁰ OJ C 27, 26.01.1998, p. 3 also at

<http://www.curia.eu.int/common/recdoc/convention/fr/c-textes/brux-idx.htm>;

¹¹ A sister treaty was signed with the European Free Trade Association: the Lugano Convention, of the 16th September 1988, OJ 1988, L 319 p. 9;

¹² 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), Official Journal C 027, 26/01/1998 p. 0034 – 0046. - Richard PLENDER, *The European Contracts Convention, The Rome Convention on the Choice of Law for Contracts*, Sweet and Maxwell 1991.

¹³ See the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final. At http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0427en01.pdf

¹⁴ See in particular: 95/401/JHA: Joint Action of 25 September 1995 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on measures implementing Article K.1 of the Treaty (*OJ L 238, 6.10.1995, p. 1-1*) - 2001/470/EC: Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, (*OJ L 174, 27.6.2001, p. 25-31*). - Christian KOHLER, *Interrogations sur les sources du droit international privé européen après le traité d'Amsterdam*, RCDIP 1999, p. 1 et ss. - Jürgen BASEDOW, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, *Common Market Law Review* 2000, pp. 687.

Since then, the European Commission has been very prolific in the field of harmonising private international law.¹⁵ Doing so, it has harmonised private international law in a great number of fields technically using a variety of legal instruments.

If the fact that the Commission is reaching out to regulate parts of law that had been ignored before is not very problematic, the fact that it uses a variety of legal instruments ranking from traditional international treaties to European Regulations is presently creating some confusion.¹⁶ Notwithstanding the fact that the legal form of a text can change its scope drastically, it appears that the legal reasoning that underlies the newer European texts does not follow classic private international law rules.¹⁷ It also appears that the European Union is infringing more and more on the Member States' own Treaty making competences.¹⁸

I. The Wide Scope of European Private International Law

Article 65 of the Treaty establishing the European Community provides,

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

¹⁵ A. FUCHS, H. MUIR-WATT, E. PATAUT (sous la dir. de), *Les conflits de lois et le système juridique communautaire*, Dalloz, col. *Thèmes et commentaires*, 2004.

¹⁶ This situation should be distinguished from the coexistence in certain fields of international law rules applied in each Member State and European law rules laid down by the European Community. See on this question, Jean- Sylvestre BERGÉ, *L'enchevêtrement des normes internationales et européennes dans l'ordre juridique communautaire : contribution à l'étude du phénomène de régionalisation du droit*, LPA, 5 octobre 2004, n° 199, p. 32. – *Droit international et droit communautaire – perspectives actuelles*, Colloque Bordeaux 1999, éd. Pédone 2000. Our purpose here is to show how the use by the European Community of various legal norms in the same field of law can be confusing.

¹⁷ David LEFRANC, *La spécificité des règles de conflit de lois en droit communautaire dérivé (aspects de droit privé)*, *Rev. crit. DIP*, 2005, p. 412, 415.

¹⁸ M. WILDERSPIN, A.-M. ROUCHAUD-JOËT, *La compétence externe de la Communauté européenne en droit international privé*, *RCDIP* 2004, p. 1, spéc. p. 27 et suiv.

- the system for cross-border service of judicial and extrajudicial documents,
- cooperation in the taking of evidence,
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Many of these fields are now regulated on a European-wide level such as the cross-border service of judicial and extra judicial documents¹⁹ and cooperation in the taking of evidence.²⁰ This paper aims to concentrate solely on the specific issues linked to conflicts of law (B) and jurisdiction (A).

(A.) Conflicts of Jurisdiction

The concept of “Conflicts of jurisdiction” answers the question: *which country’s courts have jurisdiction in a dispute?* In European law there are a number of general instruments²¹ which have been regrouped here under the title the Brussels Convention and Regulations (1). More specific rules are applied in Insolvency proceedings (2). Even if these instruments have in common a unified private international law system, it appears that the aim of

¹⁹ Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160, 30.6.2000, p. 37–52. - Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, Official Journal L 143 , 30/04/2004 P. 0015 - 0039 - Commission Regulation (EC) No 1869/2005 of 16 November 2005 replacing the Annexes to Regulation (EC) No 805/2004 of the European Parliament and of the Council creating a European Enforcement Order for uncontested claims, Official Journal L 300 , 17/11/2005 P. 0006 – 0018 – KARL BELTZ, *Le titre exécutoire européen* (TEE), Dalloz 2005, Chr. p. 2707.

²⁰ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ L 174, 27.6.2001, p. 1–24.

²¹ Certain passages of the following text have been taken out of the website www.europa.eu in respect to questions on jurisdiction and conflicts of law.

such instruments is more the accomplishment of an internal market in Europe, rather than the coordinating of legal systems (3).

1. The Brussels Convention and Regulations

The Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters was concluded on 27 September 1968.²² It was replaced by a Brussels I Regulation in 2000²³ which applies to all Member States except Denmark²⁴.

The Brussels I Regulation applies in most civil and commercial matters except questions pertaining to: the status or legal capacity of natural persons, matrimonial matters, wills and succession; bankruptcy; social security; and arbitration.

The basic principle is that jurisdiction is exercised by the Member State in which the defendant is domiciled, regardless of his or her nationality.²⁵ Domicile is determined in accordance with the domestic law of the Member State where the court has been seized. In the case of legal persons or firms, their domicile is determined by the country where they have their statutory seat, central administration or principal place of business.²⁶

²² Official Journal C 189 of 28.07.1990. - The rules of the Convention were extended to the States belonging to the European Free Trade Association by the Lugano Convention, signed on 16 September 1988 and also to all new Member States. A consolidated version of the Convention was published in 1998 (OJ C 27 of 26.01.1998).

²³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1–23.

²⁴ See Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 299, 16.11.2005, p. 62–67. - Agreement between the European Community and the Kingdom of Denmark on the service of judicial and extrajudicial documents in civil or commercial matters, OJ L 300, 17.11.2005, p. 55–60.

²⁵ ECJ 13 July 2000. - Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC). - - Case C-412/98. ECR 2000 Page I-05925.

²⁶ In the case of trusts, domicile is defined by the judge of the Member State whose court has been seized; the court applies its rules of private international law. See in particular, the Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition.

The Brussels II and II bis²⁷ Regulations²⁸ concern jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility.²⁹

The Regulation applies to civil proceedings relating to divorce, separation and marriage annulment, and to all aspects of parental responsibility.³⁰ Parental responsibility refers to the full set of rights and obligations in relation to a child's person or property. In order to ensure equality for all children, the Regulation covers all judgments on parental responsibility, including measures to protect the child, independently of any matrimonial proceedings.

²⁷ Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, (OJ L 338 23.12.2003 p. 1). This Regulation came into force on 1 August 2004 and applies from 1 March 2005.

²⁸ As a general rule the Regulation replaces the existing conventions between two or more Member States that concern the same matters, and it will prevail over certain multilateral conventions on relations between Member States that concern matters governed by the Regulation: the Hague Convention of 1961 (law applicable to protection of minors), the Luxembourg Convention of 1967 (recognition of decisions on marriage), the Hague Convention of 1970 (recognition of divorces), the European Convention of 1980 (custody of children), and the Hague Convention of 1980 (civil aspects of international child abduction). Special provisions are applicable to: relations of Finland and Sweden with Denmark, Iceland and Norway as regards the application of the "Nordic Marriage Convention" of 6 February 1931; relations between the Holy See and Portugal, Italy and Spain.

²⁹ Cf. the Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ L 48, 21.2.2003, p. 3–13 and 2003/93/EC: Council Decision of 19 December 2002 authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, OJ L 48, 21.2.2003, p. 1–2.

³⁰ With regard to relations with the Hague Convention of 19 October 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children, the EC Regulation is fully applicable if the child in question is habitually resident in a Member State. The rules on recognition and enforcement also apply if the competent court in a Member State issues a judgment, even if the child in question is habitually resident in a non-Member State that is a party to the Hague Convention.

The Regulation does not apply to civil proceedings relating to maintenance, which are covered by the Brussels I Regulation.³¹ The Regulation also excludes the following cases: establishing and challenging paternity; judgments on adoption and the related preparatory measures, and annulment or revocation of adoption; the child's first and last names; emancipation; trusts and inheritance; measures taken following criminal infringements committed by children.

Matters relating to parental responsibility generally come under the jurisdiction of the courts of the Member State that is the habitual residence of the child. But there are exceptions.³²

Where a child's habitual residence cannot be established, then the Member State in which the child is present will assume jurisdiction by default.³³ Where it is not possible to define jurisdiction on the basis of the specific provisions laid down by the Regulation, each Member State may apply its national legislation.

The Regulation also lays down rules on child abduction. The general rule of jurisdiction is that the courts of the Member State in which the child was habitually resident immediately before the abduction continue to have jurisdiction until the child is habitually resident in another Member State (subject to the assent of all persons holding rights of custody and a minimum period of one year of residence).

The courts of the Member State to which the child has been abducted can only refuse return of the child if there is a serious risk that return would

³¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

³² In certain cases of relocation, that is of a lawful change of residence of a child, where the courts of the Member State of the former residence of the child have already issued a judgment on parental responsibility (particularly as concerns rights of access), this matter continues to come under the jurisdiction of the courts of that State. Moreover, the spouses may accept the jurisdiction of the divorce court to also decide on matters of parental responsibility.

In certain cases, the parents may also agree to bring the case before the courts of another Member State with which the child has a close connection. Such a connection may, for instance, be based on the nationality of the child.

³³ This provision applies, for instance, to cases of refugee children or children internationally displaced because of disturbances occurring in their countries of origin.

expose the child to physical or psychological harm (under Article 13(b) of the Hague Convention of 1980).³⁴

The Regulation provides for automatic recognition of all judgments without any intermediary procedure being required and restricts the grounds on which recognition of judgments relating to matrimonial matters and matters of parental responsibility may be refused.³⁵

The enforcement procedure is governed by the domestic law of the Member State of enforcement.

Similar rules apply to transnational insolvencies.

1. Insolvency

The winding-up of insolvent companies, compositions and analogous proceedings are excluded from the scope of the 1968 Brussels Convention. Work has been carried out at various levels since 1963 with a view to formulating a Community instrument in the field. A Convention on insolvency proceedings was concluded on 23 November 1995. One Member State failed to sign the convention within the time limit and it could not enter into force. The Amsterdam Treaty lays down new provisions for judicial cooperation in civil matters. It was on this basis that the Regulation on insolvency proceedings was adopted in 2000.³⁶

The Regulation applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator". It applies equally to all proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. However, it does

³⁴ See also Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children OJ L 048 , 21/02/2003 p. 0003 – 0013.

³⁵ These are the following: recognition is manifestly contrary to public policy; the respondent was not served with the document which instituted the proceedings in sufficient time to arrange for his or her defence; recognition is irreconcilable with another judgment. For judgments in matters of parental responsibility there are two further grounds for non-recognition: the child was not given an opportunity to be heard; a person claims that the judgment infringes his or her parental responsibility, if it was issued without such person having been given an opportunity to be heard.

³⁶ Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160 30.06.2000 p. 1.

not apply to insolvency proceedings concerning: insurance undertakings; credit institutions; investment undertakings which provide services involving the holding of funds or securities for third parties; collective investment undertakings.

The courts with jurisdiction to open insolvency proceedings are those of the Member State where the debtor has his centre of main interests. In the case of a company or legal person, this is the place of the registered office (in the absence of proof to the contrary).

Secondary proceedings may be opened subsequently to liquidate assets located in another Member State. In some cases, such proceedings may be opened before the main proceedings if the local creditors and the creditors of the local establishment request it or where main proceedings cannot be opened under the law of the Member State where the debtor has his main centre of interests.

The law of the Member State in which proceedings are opened determines all the effects of those proceedings: the conditions for the opening of the proceedings, their conduct and their closure, and questions of substance (definition of debtors and assets, effects of proceedings on contracts, individual creditors, claims, etc.).

Decisions by the court with jurisdiction for the main proceedings are recognised immediately in the other Member States without further scrutiny.³⁷

a. The choice between creating an internal market or coordinating legal systems

Traditionally, private international law rules aim at coordinating legal systems, pointing to the country most connected to the situation. The rules presented above thus all point to giving jurisdiction to the courts of the country where the defendant (or the child) has his domicile, residence or central interests. Yet, European rules have a particularity: they all imply that the defendant is resident in a Member state. This is a unilateral approach to the conflict rule. If the defendant is resident outside the European Union, each Member state of the European Communities was free (until 2001) to apply its

³⁷ Except where the effects of such recognition would be contrary to the State's public policy; in the case of judgments which might result in a limitation of personal freedom or postal secrecy. However, restrictions on creditors' rights (a stay or discharge) are possible only in the case of those who have given their consent.

own private international law rules and in particular accede to international Conventions with Third State Countries.³⁸ Uniform rules in respect to jurisdiction thus only exist in the European internal market. In respect to defendants outside Europe, private international law rules are far from uniform.³⁹ However this uniform internal market approach aims at promoting the fundamental principle of free circulation in the EU and thus is more an application of European community law than of private international law reasoning.

A similar stand point is taken in enforcement procedures. They are governed by the domestic law of the Member State of enforcement who will recognise without further scrutiny a decision taken by the courts of another Member State. This principle of mutual recognition is a traditional European law principle that is foreign to traditional private international law.

Similar findings characterize conflicts of laws.

a. Conflicts of Laws

This answers the question - which country's substantive law is to be applied by the court hearing the case? The main text in this respect is the Rome Convention which applies traditional private international law methods (1). On the contrary, secondary European legislation adopts a new approach (2).

1. The Rome Convention

The Convention on the law applicable to contractual obligations was opened for signature in Rome on 19 June 1980 for the then eight Member States. It entered into force on 1 April 1991. In due course, all the new members of the European Community signed the Convention.⁴⁰ When the

³⁸ FAUSTO POCAR, La codification européenne du droit international privé : vers l'adoption de règles rigides ou flexibles vers les États tiers ? in *Le droit international privé : esprit et méthodes*, Mélanges en l'honneur de Paul Lagarde, Dalloz 2005, p. 697-705 spéc. p. 700.

³⁹ JEAN-SYLVESTRE BERGÉ, Le droit d'une « communauté de lois » : le front européen, in *Le droit international privé : esprit et méthodes*, Mélanges en l'honneur de Paul Lagarde, Dalloz 2005, p. 113-136.

⁴⁰ Convention on the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, and to the

Convention was signed by Austria, Finland and Sweden, a consolidated version was drawn up and published in the Official Journal in 1998.⁴¹

The Convention applies to contractual obligations in situations involving a choice of laws - even where the law it designates is that of a non-contracting State.⁴²

The signatories to a contract may choose the law applicable to the whole or a part only of the contract and select the court which will have jurisdiction over disputes. By mutual agreement they may change the law applicable to the contract at any time (principle of freedom of choice).

If the parties have not made an explicit choice of applicable law, under article 4, the contract is governed by the law of the country with which it is most closely connected, according to the principle of the proper law (place of habitual residence or place of central administration of the party performing the contract, principal place of business or place of business responsible for performing the contract). However, specific rules apply in two cases: where the contract concerns immovable property, the law applicable by default is that of the country in which the property is situated; where the contract concerns the transport of goods, the applicable law is determined according to the place of loading or unloading or the principal place of business of the consignor.

To protect the rights of the consumer, the supply of goods or services to a person is covered by special provisions, according to the principle of the protection of the weaker party. Unless the parties decide otherwise, such contracts are governed by the law of the country in which the consumer has

First and Second Protocols on its interpretation by the Court of Justice of the European Communities, Official Journal C 169 , 08/07/2005 p. 0001 – 0009.

⁴¹ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), Official Journal C 027 , 26/01/1998 P. 0034 – 0046.

⁴² With the exception of: questions involving the status or legal capacity of natural persons; contractual obligations relating to wills, matrimonial property rights or other family relationships; obligations arising under negotiable instruments (bills of exchange, cheques, promissory notes, etc.); arbitration agreements and agreements on the choice of court; questions governed by the law of companies and other corporate and unincorporate bodies; the question of whether an agent is able to bind a principal to a third party (or an organ to bind a company or body corporate or unincorporate); the constitution of trusts and questions relating to their organisation; evidence and procedure; contracts of insurance which cover risks situated in the territories of the Member States (re-insurance contracts are covered, however).

his habitual residence. In no circumstances may the choice of law work to the disadvantage of the consumer or deprive him of the protection afforded by the law of his country of residence where it is more favourable.⁴³

In respect to the commentaries above on the questions of jurisdiction, the Rome Convention is a traditional private international law instrument. This can not be said of European secondary legislation.

1. Harmonising Private International law in Secondary Legislation

Private international Law has been harmonised in various secondary legislation,⁴⁴ such as company law, labour law, and financial services law.⁴⁵ It would be impossible to list here all the norms affecting the applicable law in contractual matters in sectoral instruments of secondary legislation.⁴⁶ Two examples will therefore serve our point: first, consumer law (a), then, intellectual property law (b). In all these cases a new approach to private international law rules is applied (c).

a. Consumer Law

The Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis lays down in Article 9:

⁴³ These rules do not apply to contracts of carriage or contracts for the supply of services in a country other than that in which the consumer has his habitual residence.

⁴⁴ David LEFRANC, *La spécificité des règles de conflit de lois en droit communautaire dérivé*, Rev. crit. DIP, 2005, p. 412.

⁴⁵ Norbert REICH, *EG-Richtlinien und internationale Privatrecht*, in *L'eupéanisation du droit international privé*, Série de publications de l'Académie de Droit Européen de Trèves Vol. 8, 1996, p. 109-126.

⁴⁶ Directive on the return of cultural objects unlawfully removed from the territory of a Member State (1993/7, 15.3.1993); Directive on unfair contract terms (1993/13, 5.4.1993) ; Directive on time-sharing (1994/47, 26.10.1994) ; Directive concerning the posting of workers in the framework of the provision of services (1996/71, 16.12.1996); Directive 97/7, 20.5.1997 on the protection of consumers in respect of distance contracts; Directive 1999/44, 25.5.1999 on certain aspects of the sale of consumer goods and associated guarantees; Second non-life insurance Directive (1988/357, 22.6.1988) as supplemented and amended by Directive 1992/49 and 2002/13; Second life assurance Directive (1990/619, 8.11.1990) as supplemented and amended by Directives 1992/96 and 2002/12

The Member States shall take the measures necessary to ensure that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive, if the immovable property concerned is situated within the territory of a Member State.

The Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts provides in Article 12 (Binding nature):

1. The consumer may not waive the rights conferred on him by the transposition of this Directive into national law. 2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.

The Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services,⁴⁷ in particular electronic commerce, in the Internal Market⁴⁸ ("Directive on electronic commerce") lays down the so called "country of origin rule". Under Article 3, providers of information society services (Internet site operators, for example) are subject to the legislation of the Member State in which they are established (also originating country rule⁴⁹ or "Internal Market clause"). The Directive defines a provider's place of establishment as the place in which a service provider effectively pursues an economic activity using a fixed establishment for an indefinite period.

b. Intellectual property

The Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases provides in Article 11 (Beneficiaries of protection under *the sui generis* right):

⁴⁷ It covers the following on-line sectors and activities in particular: newspapers, databases, financial services, professional services (solicitors, doctors, accountants, estate agents), entertainment services (video on demand, for example), direct marketing and advertising and Internet access services.

⁴⁸ The Directive applies solely to service providers established in the European Union (EU). However, to avoid affecting global electronic commerce, the Directive seeks to avoid incompatibilities with legal trends in other parts of the world.

⁴⁹ M. Fallon, *Variations sur le principe d'origine, entre droit communautaire et droit international privé*, in *Mélanges rigaux*, Bruylant, 1993, p. 183.

1. The right provided for in Article 7 shall apply to database whose makers or right holders are nationals of a Member State or who have their habitual residence in the territory of the Community. 2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

c. The new approach to private international law

European secondary legislation tends to promote the concept of a uniform internal market without taking into consideration the outside world. In consumer directives, European law will apply systematically to a consumer if the law normally applicable to the contract, that is, the law of a country non-member of the European Union, does not ensure a level of protection equivalent to European law. In this respect, the European Union adopts a unilateral approach very different from traditional private international law rules.

In a similar manner, the country of origin principle tends at mutual recognition between member states of the European Union, but does not give the same treatment to non-member States.

In both cases the use of conflict rules aim less at coordinating legal systems than at creating a unified legal internal market. Yet even in this legal internal market, private international law rules still need more harmonisation due partly to a normative confusion.

I. The normative confusion created by the Harmonisation of Private International Law

Harmonising Private International Law entails adopting the same type of rules in every Member State. European Law offers a variety of norms that allow this: International Treaties, Directives and Regulations. The choice of a legal instrument depends on how big the desire for European Integration is, and whether the law making body aims at uniformity, harmonisation or

coordination.⁵⁰ As it will be shown, the choice is difficult (A) and can create contradictions and inconsistencies (B).

A. Uniformity or Harmonisation: The Difficult Choice of Legal Instruments

At Community level, the Rome Convention is the only private international law instrument still in the form of an international treaty. This was in the past the best legal instrument to ensure uniformity. It is also generally considered by specialists as the best possible instrument in terms of international law.⁵¹ Yet, an analysis of a number of judgments given by national courts showed that certain articles of the Convention were not always being applied uniformly.⁵² Many reasons explain these differences.⁵³

Often the national courts tend to interpret the Convention in the light of previous solutions, either to fill in gaps in the Convention or to modify the interpretation of certain flexible provisions. Examples of these differences can be found in Article 1(1) (material scope: definition of contract, for example the question whether contract chains should be included) or Article 3(1) (definition of tacit choice: what about the reference to a legal concept specific to a given legal system).⁵⁴

In other cases, judges interpret the texts in the light of their own national legal reasoning, without trying to comply with solutions found in

⁵⁰ Jürgen BASEDOW, Spécificité et coordination du droit international privé communautaire, in *Les travaux du comité français de DIP* 2005, p. 275-305.

⁵¹ David LEFRANC, La spécificité des règles de conflit de lois en droit communautaire dérivé, *Rev. crit. DIP*, 2005, p. 412, 415.

⁵² Pierre-Yves GAUTIER, Inquiétudes sur l'interprétation du droit uniforme international et européen in *Le droit international privé : esprit et méthodes*, Mélanges en l'honneur de Paul Lagarde, Dalloz 2005, p. 327-342.

⁵³ Catherine KESSEDJIAN, La Convention de Rome du 19 juin 1980 sur la loi applicable aux obligations contractuelles - vingt ans après, in *Private International Law in the International Arena, From National Conflict Rules Towards Harmonization and Unification*, Liber amicorum Kurt Siehr, TMC Asser Press 2000, p. 336 - Michael WILDERSPIN, The Rome Convention – Experience to date before the Courts of the Member States, in *L'eupéanisation du droit international privé*, Série de publications de l'Académie de Droit Européen de Trèves Vol. 8, 1996, p. 47, p. 50.

⁵⁴ Another source of divergent interpretations is that certain Member States have chosen to incorporate the provisions of the Convention in their national legislation by statute, sometimes amending the original text.

other jurisdictions (e.g. art. 4, law applicable when the parties have made no explicit choice- and art 12, assignment of claims).

There is no doubt that uniform interpretation of the Rome Convention by the Court of Justice would improve the consistency of the interpretation of conflict of laws' rules at EC level. As the Green Paper on the conversion of the Rome Convention of 1980 explains, converting the Rome Convention into a Community instrument would, by establishing uniform private international law within the Member State, accord the Court of Justice jurisdiction over interpretation and would facilitate the application of standardised conflict rules in the new Member States. This has always been the case of the Brussels Convention subsequently transformed into a European regulation.

Additionally, converting the Convention into a Community instrument would ensure that the Court of Justice would have identical jurisdiction over all the Community private international law instruments. The Court of Justice could therefore ensure that the legal concepts common to the Rome Convention and the Brussels I Regulation are interpreted in the same manner.⁵⁵

The choice of instrument by the Commission is important, as the legal consequences of the instrument chosen can be very different. An international treaty provides for uniformity, yet renders very difficult any modifications, as all States have to agree to the changes. A European directive aims at finding a uniform solution to a problem, yet letting each Member State decide which tools to use. A European Regulation provides for a uniform solution and imposes a uniform way to solve the legal problems yet it does not take national differences into account.

Up to recently, a variety of norms in Private International law have been implemented in Directives. Yet many authors⁵⁶ have underlined that there are a number of uncertainties and delays inherent in the transposal of directives.⁵⁷ Nowadays, the Commission favours the regulation, which is binding and directly applicable.

⁵⁵The concept of consumer, for example.

⁵⁶De Vareilles-Sommières Pascal, *Un droit international privé européen ?*, in *Le droit privé européen*, Economica, p. 136, spéc. p. 145.

⁵⁷This was the case, for example for the Directive on unfair terms adopted in 1993. This directive provides that a "consumer does not lose the protection of the Directive by virtue of the choice of the law of a non-member country as the law

It appears nevertheless that even if the regulation seems to create better uniformity in respect to the texts of Private international law, only the adoption of a directive manages to conciliate the unavoidable divergences in interpreting private international law norms. Furthermore, even if a text is drafted in an identical way, it is very difficult to avoid a number of contradictions and inconsistencies.

B. Contradictions and Inconsistencies

Uniformity of legislation would be ideal in a single European Market. The European Commission has this aim. Nevertheless, this aim might only be a dream, as diversity grows today in Europe.

Any legal scholar is aware of the fact that law reflects society, its history, its culture and its way of life. Uniformity is only possible in a uniform society. Even if the European ideal has greatly progressed in recent years, nobody would risk saying that the Italian culture is identical to the German or British ones. The same goes for legal culture: common lawyers will always have a “bottom up” way of reasoning, going from the facts to “discover” the law; whereas civil lawyers will have a “top down” approach, adapting a predefined legal text to a factual situation. It would therefore be very difficult not only to find the same legal solution but also to impose the same legal reasoning to lawyers of each culture. Yet this is what the European Commission is trying to do.

A very good example can be taken out of the Rome Convention. Article 4 of the Convention provides for the law applicable in the absence of choice by the parties.⁵⁸ In the intention of the drafting fathers, the architecture of this article was very simple. Under paragraph 1, “the contract shall be

applicable to the contract if the latter has a close connection with the territory of the Member States”. Yet, if the same contract were subjected to the Rome Convention, it is not at all improbable that the law of the said third country would apply. In other terms, the consumer victim of unfair contract terms benefits from a better protection than a consumer whose contract is considered to be normal.

⁵⁸ Uwe BLAUROCK, *Vermutungen und Ausweichklausel in Art. 4 EVÜ – ein tauglicher Kompromiss zwischen starren Anknüpfungsregeln und einem flexible approach ?*, Festschrift Hans Stoll, Mohr Siebeck 2001, S. 463. - Jonathan HILL, *Choice of Law of Contract under the Rome Convention : The Approach of the UK Courts*, ICLQ Vol. 53, April 2004, p. 325. - Simon ATRILL, *Choice of Law in Contract : The Missing Pieces of The Article 4 Jigsaw?*, ICLQ, Vol. 53, July 2004, p. 549.

governed by the law of the country with which it is the most closely connected.” Paragraph 2 adds that “it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract, his habitual residence, or, in the case of a body corporate or incorporate, its central administration.” Finally, Paragraph 5 states that the presumption in paragraph 2 shall be disregarded “if it appears from the circumstances as a whole that the contract is most closely connected with another country.”

Depending on whether the case is submitted to a common lawyer or a civil lawyer, the reasoning is very different. The common lawyer will simply look at the facts to find the country with closest connection. The civil lawyer will first try to determine what the performance characteristic of the contract⁵⁹ is, and only if this fails will he look for the country with the closest connection.⁶⁰

⁵⁹ Hans Ulrich JESSURUN D’OLIVEIRA, « Characteristic Obligation » in the Draft EEC Convention, *Am. J. ; Comp. L* (Vol. 25) 1977, p. 303, p. 330. - JOLANTA KREN KOSTKIEWICZ, *Das Verhältnis zwischen dem engsten Zusammenhang und der charakteristischen Leistung* (Art. 117 Abs. 1 und 2 IPRG) – dargestellt anhand ausgewählter Innominatverträge, in *Private International Law in the International Arena, From National Conflict Rules Towards Harmonization and Unification*, Liber amicorum Kurt Siehr, TMC Asser Press 2000, p. 361, p. 363. - Marie-Elodie ANCEL, *La prestation caractéristique dans les contrats*, *Economica*, 2002.

⁶⁰ This should change in the future with the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)/* COM/2005/0650 final - COD 2005/0261 */ see the proposed Article 4 – *Applicable law in the absence of choice*

1. *To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law determined as follows:*

(a) *a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;*

(b) *a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence;*

(c) *a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;*

(d) *a contract relating to a right in rem or right of user in immovable property shall be governed by the law of the country in which the property is situated;*

(e) *notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence,*

Therefore a uniform text will not necessarily produce a uniform interpretation, and it seems that the European Commission should take this into account when drafting legislation, in particular in a field of law where the concepts and categories differ very much from one country to another (e.g. what is a trust in a civil law system?).

By way of conclusion,

Everybody knows that the quickest way to go from Florence to Geneva is to fly by plane. Others go the long way, over the Alps, through snow covered passes. Once upon a time, Elephants attempted an impossible route, and the feat is still discussed nearly two thousand years later. They were unprepared and their thick hides did not protect them from the cold. Yet their leader Hannibal had a dream and he accomplished it.

The route chosen to Harmonize Private International Law is just as difficult, but Private International lawyers tend to be dreamers, who luckily benefit from the very strong will power of the European Commission. The work to be done is still considerable, in many fields⁶¹. The European Community has not yet achieved its aim, but perhaps this aim is not yet clearly defined.⁶² The European Community must choose between harmonizing the interplay of national legal systems, in other words

provided the tenant is a natural person and has his habitual residence in the same country;

(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;

(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;

(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.

2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.

⁶¹ For example see, Green Paper on applicable law and jurisdiction in divorce matters {SEC(2005) 331}/* COM/2005/0082 final */ - Proposal for a Council Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations {SEC(2005) 1629} /COM/2005/0649 final - CNS 2005/0259 */

⁶² Sylvette GUILLEMARD, Alain PRUJINER, La codification internationale du droit international privé : un échec ?, (2005) 46 Les Cahiers de droit 175.

coordinating legal systems, or creating an internal conflicts rule system specific to the European internal market.